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No. 00-

IN THE

Supreme Court of the United States

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and H & H CONSOLIDATED INC.,

Petitioners,

v.

FREDERICK A. PUSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED

1. May a court declare a state regulatory statute to be enforceable on an enclave over which the state has ceded exclusive jurisdiction to the United States, on the ground that the cession of jurisdiction was conditioned on the enclave's being used for a purpose the court deems to be different from the use subsequently made of the enclave by the United States, where both the federal government and the state agency responsible for enforcement of the regulatory statute in question maintain that the United States retains exclusive jurisdiction, and the language conditioning the state's cession of jurisdiction is ambiguous?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The orders of the Supreme Court of Virginia refusing Petitioners' petitions for appeal and denying Petitioners' petition for rehearing are unreported and are reprinted in the Appendix to this Petition at App. 1a, 2a and 18a. The opinion and order of the Circuit Court of Accomack County granting Respondent's motion for summary judgment with respect to the question presented here are unreported and are reprinted at App. 3a-11a and 12a-13a. The order of the Circuit Court granting Respondent's motion for summary judgment as to liability is unreported and is reprinted at App. 14a-17a. The order of the Circuit Court entering final judgment on behalf of Respondent is unreported and is reprinted at App. 19a-23a.

JURISDICTION

The Supreme Court of Virginia refused Petitioners' petitions for appeal on September 13, 2000, App. 1a and 2a, and denied a timely petition for rehearing on November 3, 2000, App. 18a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 8, cl. 17 of the United States Constitution provides in pertinent part that "Congress shall have Power . . . to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

STATEMENT OF THE CASE

1. In 1940, the Virginia General Assembly enacted a statute providing that, "for the purpose of enabling the United States of America to further the National Defense at Hampton

Roads Naval Operating Base, Norfolk, Virginia, and at or near the Naval Proving Ground, Dahlgren, Virginia, the Commonwealth hereby cedes to the United States of America exclusive jurisdiction" over land near those sites. Chapter 14, Act of Assembly 1940 (Ex. A)[1]. The statute further provided that "the jurisdiction hereby ceded shall continue no longer than the United States shall own such lands in fee simple and they shall be used and occupied by the United States for naval purposes." *Id.*

The United States Government thereupon began acquiring the specified land, which is situated in Accomack County, Virginia. Title to the first two parcels of land was acquired by the United States in 1942 (Exs. D2, E2), and title to a third parcel was acquired in 1944. (Ex. F2). The Secretary of the Navy accepted exclusive jurisdiction on behalf of the United States over the first two parcels in 1943 and over the third in 1949, by letters stating that the Navy was accepting jurisdiction "on behalf of the United States in the manner and form granted and ceded by an Act of the General Assembly of the Commonwealth of Virginia, approved February 7, 1940 (Chapter 14, Act of Assembly 1940)." (Exs. D3, E3, F3). Virginia's Governor acknowledged the United States' acceptance of jurisdiction by signature on each of the letters.[2]

2. Both Virginia and the United States understood that the "naval purposes" for which the land was to be used were aviation-related activities. The Virginia statute noted that the land as to which jurisdiction was being ceded was being "acquired for use as auxiliary air fields." Ch. 14, Act of

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[1] We cite to the Joint Stipulated Exhibits filed in the Circuit Court of Accomack County as "Ex. _____."

[2] Title to a fourth parcel adjacent to the first three was acquired by the United States in 1952. (Ex. G2). The parties have not located any documents indicating that the United States formally acquired exclusive jurisdiction over this parcel. The jurisdictional status of the fourth parcel need not be determined in resolving the question presented in this case.

Assembly 1940. (Ex. A). The Navy built runways, aircraft hangars, an operations tower and other aviation-related facilities on the property, which the government named the Wallops Flight Facility ("WFF"). (Ex. C). The land is not adjacent to nor does it have access to any deep water; accordingly, there never was any contemplation that the land would be used for a naval port.

3. Since the time these lands first were acquired by the United States, title never has rested in any entity other than the United States, which continues to own the property in fee simple. In 1961, custody of the lands passed from one part of the United States government to another, when the Navy transferred custody to the National Aeronautics and Space Administration ("NASA"). (Ex. H3). NASA is an agency of the federal government, established pursuant to 42 U.S.C. § 2451.

When NASA took custody of WFF, the Fifth Naval District advised NASA by letter that the United States had exclusive jurisdiction over the three parcels of land. The letter included a map identifying the date upon which each parcel at WFF was acquired and the dates upon which exclusive jurisdiction was obtained. (Ex. C). The map reflects that the land was being used for aviation-related purposes at the time custody was transferred: it shows an airfield with multiple runways, fuel storage facilities, hangars, aircraft parking areas, and an operations tower.

Under NASA's stewardship, the property continued to be used by the federal government for aviation activities on behalf of the Navy and other branches of the armed forces. NASA administered thousands of rocket and satellite launches for the United States Navy, Army and Air Force between 1960 and 1988. Launches for the Navy alone totaled 2,583, while launches conducted for the benefit of the Army numbered 1,638, and for the Air Force, 574. (NASA

Response to FOIA Request # 1)[3]. While the actual launches were from a nearby island, not from the mainland sites at issue here, the facilities where the launches were administered and controlled were located on the land at issue, and most of the design and construction work for the launches occurred on that land.

In 1987, the Navy located the AEGIS Combat System Center at Wallops Island, expanding further the Navy's presence at WFF. (Ex. K).

4. The United States never has acted to relinquish its exclusive jurisdiction over these lands, although the Virginia Code sets forth a specific mechanism for doing so. Section 7.1-25.1 of the Virginia Code provides for notification to the Governor by the United States that the federal government "desires or is willing to relinquish to the Commonwealth" jurisdiction over Virginia lands. If such notice is given and accepted by the Governor, the notice of relinquishment is filed with the Secretary of the Commonwealth and entered in the deed book of the city or county in which the lands are located. The United States has utilized this simple notification procedure to relinquish exclusive jurisdiction over other lands in Virginia (Ex. V1), but has not done so with respect to the land at issue here.

In 1994, NASA notified the Virginia Attorney General that "NASA has concluded that the Federal Government, as represented by NASA, has exclusive Federal jurisdiction over parcels 1 through 3." (Ex. U1). The Virginia Department of Labor and Industry had come to the same conclusion in 1990, finding that the jurisdictional status of the lands "has not

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[3] The responses Petitioners received to their Freedom of Information Act ("FOIA") request concerning this matter were filed with the Circuit Court for Accomack County and were noted by that court in its second summary judgment order. App. 15a.

changed and that the Federal government retains exclusive jurisdiction over this land." (Exs. O, Q)[4].

5. Among the federal contractors working at WFF is Petitioner H&H Consolidated, Inc., whose employees are represented for collective bargaining purposes by Petitioners Local Lodge 2552 and District Lodge 74, International Association of Machinists and Aerospace Workers (collectively "IAM"). The collective bargaining agreement ("CBA") between H&H and IAM includes a provision that requires employees who do not choose to join IAM to pay an agency fee to cover the costs of collective bargaining representation. (Ex. T1).

Enforcement of agency fee agreements is permitted under federal law, 29 U.S.C. § 158(a)(3), *see Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), but is forbidden by Virginia's "right-to-work" law, Va. Code Ann. § 40.1-62. Petitioners negotiated and enforced the agency fee provision on the basis of their belief that the H&H worksite is under exclusive federal jurisdiction and therefore exempt from Virginia's "right-to-work" law. That belief was supported by

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[4] A Virginia Deputy Attorney General, on the other hand, concluded in 1994 that the United States had lost exclusive jurisdiction as of 1961, because "the land ceased to be controlled by the Navy, and the United States no longer occupies it for naval purposes." (Ex. U2). *See infra* note 8.

It has been the policy of the Virginia state police not to patrol the lands at WFF. (Ex. N5). Investigation of incidents occurring at WFF is the responsibility of the WFF security chief, a NASA employee, who investigates such incidents in conformance with the NASA security handbook. *Id.* The Accomack County Sheriff's Department does not enter WFF to serve process, but rather asks WFF security to bring individuals to the main gate, where service is effected. *Id.* The Commonwealth Attorney for Accomack County, who has held his position since 1985, never has prosecuted anyone for crimes occurring on WFF land, *id.*, but the United States Attorney's office has successfully brought charges under federal law for criminal acts on the property. (Exs. W2, W3).

both state and federal administrative decisions. As noted, the Virginia Department of Labor and Industry, the agency charged with enforcing the state's "right-to work" law, determined in 1990 that the federal government had exclusive jurisdiction over WFF and that the "right-to-work" law did not apply there. In an arbitration involving another federal contractor at WFF whose workers are represented by IAM under a contract containing an agency fee clause, the arbitrator similarly concluded that the United States maintained exclusive jurisdiction over WFF and that the agency fee clause therefore was binding. (Ex. S). And in this very matter, the National Labor Relations Board ("NLRB") dismissed an unfair labor practice charge brought against IAM for enforcing the agency fee clause, finding the clause permissible because WFF is a federal enclave subject to exclusive federal jurisdiction. (Ex. T6).

6. In 1995, Respondent Frederick Pusey, an H & H employee who had been discharged for refusing to pay the required agency fee, sued IAM and H&H in the Circuit Court of Accomack County, contending that enforcement of the agency fee clause violated Virginia's "right-to-work" law. The action was removed to the United States District Court for the Eastern District of Virginia, but that court remanded it back to the state court.

Notwithstanding the determinations by, *inter alia*, NASA, the NLRB, and the Virginia Department of Labor and Industry that the United States holds exclusive jurisdiction over the lands at issue, the Circuit Court for the County of Accomack ruled that jurisdiction had returned to Virginia some forty years ago. App. 10a, 12a-13a. Declaring that "[t]he question [to be decided] is . . . whether the exclusive jurisdiction of the United States in the three parcels reverted to the Commonwealth of Virginia for failure of the Navy to use and occupy the property for Naval purposes," App. 7a, the court held that such "reverter" occurred when the Navy transferred custody of the facility to NASA in 1961, at which

time "a flag belonging to NASA was raised [and] [a]ll Navy personnel departed," *id.* Asserting that "the central factual issue in this case [is] whether the property ceased to be used and occupied by the Navy," App. 10a, the court stated that, upon the transfer of custody to NASA, "the U.S. Navy . . . ceased to use and occupy the three parcels for Naval purposes," and "[t]herefore, concurrent jurisdiction reverted to the Commonwealth of Virginia," *id.* Although the court noted that, since 1987, the Navy again has had a continuous presence at WFF, the court declared that, once the Navy had transferred use of the property to NASA, "[t]here is no law that provides that exclusive Federal jurisdiction could spring up again at the much later time when the Navy again was permitted by NASA to use some of its property for some Naval purposes." *Id.*

The court deemed it immaterial that the United States had never surrendered its exclusive jurisdiction and that Virginia had not formally asserted jurisdiction over the land at issue, because "[t]he language in the [1940] Virginia Act of the cession of jurisdiction is similar to language, in real property law, of the possibility of reverter and not similar to the language of a right of entry for condition broken." App. 6a. Because a common law "possibility of reverter" (unlike a "right of entry for condition broken") results in "automatic" reverter when the specified conditions no longer exist, *id.*, the court declared that the United States automatically and permanently lost its exclusive jurisdiction over this land when the Navy transferred custody to NASA.

After granting partial summary judgment to Respondent Pusey on February 2, 1998 on the question of state jurisdiction, App. 12a-13a, the Circuit Court on November 17, 1999, granted him partial summary judgment as to liability and ordered a trial on damages. App. 14a-17a. Following trial, the court entered judgment in favor of Pusey in the amount of $135,000.00 with interest. App. 19a-23a.

The Supreme Court of Virginia refused Petitioners' petitions for appeal on September 13, 2000, App. 1a and 2a, and that Court denied Petitioners' timely petition for rehearing on November 3, 2000. App. 18a.

REASONS FOR GRANTING THE WRIT

Many federal enclaves are used today in ways that differ markedly from the particular uses that were anticipated decades ago when states initially ceded jurisdiction over such lands to the United States. This case presents an opportunity for the Court to determine whether, by "a rigid interpretation of antiquated deeds [or statutes] that failed fully to anticipate the complex development of [federal government] operations," *United States v. Johnson*, 994 F.2d 980, 986 (2d Cir. 1993), a state court may declare, contrary to the position of the relevant federal agencies (and here, contrary as well to the position of the relevant state regulatory agency) that a state regulatory statute has become enforceable against activities on a federal enclave merely because, in the state court's view, the activities conducted by the United States on the enclave do not sufficiently match those that were anticipated by the state statute that set out the basis on which the state was ceding jurisdiction.

In this case, the state court divested the United States of its exclusive jurisdiction over the Wallops Flight Facility, and subjected Petitioners to liability under a state labor law that NASA, the NLRB and the Virginia Department of Labor and Industry all consider to be inapplicable at WFF by virtue of exclusive federal jurisdiction. The state court did so on the ground that the 1940 Virginia statute ceding jurisdiction over this land to the United States stated that exclusive federal jurisdiction would continue only as long as the property was "used and occupied by the United States for naval purposes"—a phrase which the court construed as requiring that the facility be *occupied by*, and used *by* (rather than *for*) *the United States Navy* (rather than NASA). The court below

reached that result, which in no way is compelled by the statutory language, by approaching this case as if it involved a routine state-law dispute as to property rights, rather than a question of federal regulatory authority over an enclave that concededly is owned by the United States.

The decision below divesting the United States of its exclusive jurisdiction on this basis is contrary to the teaching of this Court's decision in *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 366 (1964), and the decision below conflicts in principle with the Second Circuit's decision in *United States v. Johnson, supra*. Certiorari should be granted to correct this ill-considered judicial interference with exclusive federal jurisdiction at an important federal enclave, and to provide needed guidance to the lower courts respecting the analysis to be applied when it is claimed that the federal government's changing use of an enclave has triggered a loss of exclusive federal jurisdiction.

1. It long has been settled that the federal government has broad power to acquire land for governmental use with or without the consent of the state in which the property is situated, but such acquisition does not, without more, oust the state of jurisdiction to enforce its laws on the acquired property. *See Paul v. United States*, 371 U.S. 245, 264 (1963); *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 197 (1937); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141, 147-149 (1937); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 530-531 (1885). The question whether, in addition to ownership, *jurisdiction to establish and enforce the law* in a federal enclave has been transferred from a state to the federal government is governed by the Enclave Clause of the Constitution, Art. I, § 8, cl. 17, which grants Congress the "Power . . . to exercise exclusive Legislation" over all property acquired "by the Consent of . . . the State in which the same shall be." *See Paul*, 371 U.S. at 264; *Silas Mason Co.*, 302 U.S. at 197; *Dravo Contracting Co.*, 302 U.S. at 147; *Fort Leavenworth R.R. Co.*, 114 U.S. at 531.

The Enclave Clause has been understood to require the consent of the state, either through a statute of cession or through some form of agreement, before the United States may assume legislative jurisdiction over land it has acquired. Where such consent has been given, state laws cease to operate in the federal enclave: "the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. 1, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action." *Paul*, 371 U.S. at 263.

The accession of federal legislative authority over property under the Enclave Clause thus depends on the consent of the state[5]; and this Court has held that a state "may qualify its cession by reservations not inconsistent with the governmental uses" to which the United States intends to put the property. *Dravo Contracting Co.*, 302 U.S. at 141, 147; *Paul*, 371 U.S. at 264-265. A state thus may include a "requirement in the act of cession for return of sovereignty to the State when the ceded territory [i]s no longer used for federal purposes," *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 563 (1946), or where the property is not used for "the public purposes for which the property was acquired," *Fort Leavenworth R.R. Co.*, 114 U.S. at 542. *See Palmer v. Barrett*, 162 U.S. 399 (1896) (jurisdiction over land ceded for military purposes reverted to the state when the land was leased by the Navy to Brooklyn to be used as a marketplace).

So much is settled law. And it is settled as well that, even though the existence and scope of federal jurisdiction over acquired land depends on the consent of the state as expressed

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[5] Of course, Congress may assert regulatory authority over certain activities conducted in federal enclaves by virtue of sources of power other than the Enclave Clause. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541-546 (1976) (Property Clause gives Congress authority to regulate activities on federal land even if the state has not ceded jurisdiction pursuant to the Enclave Clause).

in state laws, "[t]hat question . . ., involving the extent of the jurisdiction of the United States, is necessarily a federal question." *Silas Mason Co.*, 302 U.S. at 197. *See also Paul*, 371 U.S. at 267; *Wilson v. Cook*, 327 U.S. 474, 486 (1946).

2. It has proved easier to state those substantive rules than to formulate principles of construction for determining whether a particular exercise of jurisdiction over a federal enclave involves a matter that has been ceded to the federal government, on the one hand, or reserved by the state, on the other.

In an earlier period of our history, when many federal enclaves had only recently been acquired, the question frequently arose whether, in the first instance, the United States had assumed, and the affected states had ceded, exclusive jurisdiction over particular property. This Court was called upon to resolve many such disputes. *See, e.g., Silas Mason Co.; Dravo Contracting Co.; Fort Leavenworth R.R. Co.; Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938); *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929).

Such questions rarely have come before the Court in more recent years, largely because of the enactment in 1940 of a statute, codified at 40 U.S.C. 255, which "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction'." *Adams v. United States*, 319 U.S. 312, 314 (1943) (quoting Hearings on H.R. 7293 before the House Committee on Buildings and Grounds, 76th Cong., 1st Sess. 7 (1939))[6].

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[6] The statute provides in pertinent part as follows:

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required, but the head or other authorized officer of any department or independent establishment or agency of the

The statute does *not*, however, speak to the Enclave Clause problem that is of principal concern in the post-1940 era. In many instances there have been major changes in the activities conducted by the federal government on enclaves acquired decades ago, and therefore courts must struggle with the question whether the current use of a federal enclave is so different from the use that was contemplated when the state initially ceded jurisdiction that the cession no longer should be considered operative. 40 U.S.C. § 255 does not specify any standards that should be applied in resolving such a question.

3. The court below assumed that the matter should be approached as if it were a routine question of land ownership governed by state real property law. Thus, the fact that the United States views its present jurisdiction over WFF as exclusive,[7] and the fact that Virginia never has asserted a right to reassume jurisdiction,[8] were accorded no signi-

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Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

[7] *See supra* at 4, 6.

[8] The Virginia agency responsible for enforcing the state "right-to-work" statute on which Respondent Pusey relies has determined that Virginia cannot enforce that law against contractors working at WFF because federal jurisdiction is exclusive. Exs. O, Q. On the other hand, a Virginia Deputy Attorney General has expressed the view that "the United States no longer enjoys exclusive jurisdiction over that territory." Ex. U2.

ficance, because, "in real property law," those considerations would be relevant only in the case of "a right of entry for condition broken" rather than a "possibility of reverter," App. 7a, and the court below viewed the terms of the Virginia cession statute as "similar to" the latter rather than the former, *id.*

In construing the "possibility of reverter" contained in the cession statute—which, as noted, provides that "the jurisdiction hereby ceded shall continue no longer than the United States shall own [the] lands in fee simple and they shall be used and occupied by the United States for naval purposes," *see supra* at 2—the Circuit Court did not pause to consider why the state and federal governments might have agreed to that particular provision. Instead, the court construed the words without any reference to the context in which they were used, and pronounced that the language referring to "naval purposes" should be construed as providing for federal jurisdiction only so long as the property was "used and occupied by the Navy." App. 10a. The court therefore deemed it conclusive that, upon transfer of custody to NASA, "the U.S. Navy . . . ceased to use and occupy the three parcels for Naval purposes." *Id.* To the Circuit Court, this necessarily meant that, as of 1961, "concurrent jurisdiction reverted to the Commonwealth of Virginia." *Id.*

Taking its reading a step further, the court declared that the transfer of custody from the Navy to NASA in 1961 so irrevocably terminated Virginia's cession of jurisdiction that the United States cannot assert exclusive jurisdiction today, even though "the Navy again [i]s permitted by NASA to use some of its property for some Naval purposes." App. 10a.

However, Virginia has taken no official position on the question, and the Deputy Attorney General's letter concludes with the recommendation that the matter "should, if at all possible, be settled with certainty between the Federal government and the States" by clarifying the matter through further statutory language. *Id.*

4. The state court's decision is unfounded. On its face, the reference in Virginia's cession statute to "naval purposes" is not confined to activities conducted directly by the United States Navy.[9] And the statute does *not* provide that exclusive federal jurisdiction may be exercised over WFF only as long as *the Navy* occupies the property; rather, the statute provides for exclusive jurisdiction as long as "*the United States* shall own such lands in fee simple and they shall be used and occupied by *the United States* for naval purposes." NASA is as much an agency of the United States as is the Navy; and even during the period when the Navy did not occupy any of the land, NASA continued to conduct aerospace activities relevant to the national defense, including launching more than 2500 rockets and satellites *for the Navy*. *See supra* at 3-4.

If the Virginia court's error were confined to a misreading of the state cession statute, this case might be a candidate only for summary reversal rather than for full briefing and argument. But the error of the Virginia court's analysis runs deeper.

In *Humble Pipe Line Co. v. Waggonner*, 375 U.S. 369 (1964), as in this case, the question presented was whether the United States had lost exclusive jurisdiction because it had ceased to use certain property for the particular military purpose—an air base—for which the land had been donated by the state. The United States (acting through the Department of the Interior rather than through the Air Force, *see id.* at 373 n.4) had leased to a private party the right to exploit parts of the land for oil and gas and for an oil pipeline. Louisiana contended "that the Federal Government ha[d] thereby lost its power to exercise exclusive jurisdiction over

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[9] Although the Circuit Court characterized the Virginia statute as allowing exclusive federal jurisdiction only for "*N*aval purposes," App. 7a, 10a (emphasis added), the statute actually refers to "*n*aval purposes," with a lower case "n".

those parts of the area." *Id.* at 372. This Court rejected that contention out of hand. "[R]ecogniz[ing] the responsibility of the Executive Department of the Government to determine what land it will acquire and hold for military purposes," *id.* at 373, the Court declared that, even though the federal government was not presently using portions of the land for military purposes, "[t]here is no evidence here which would justify a court in deciding that the government does not need to keep all of this tract intact, ready for use when needed for the highly important military purposes to which it has been dedicated," *id.*

Humble Pipe Line stands for the proposition that, where the United States has not purported to relinquish the exclusive jurisdiction it has been granted over an enclave, courts should not be quick to conclude that changes in the federal government's use of the property are such as to require a forfeit of exclusive jurisdiction. That proposition is supported by a least two considerations.

First, there is little to be said for a regime under which regulatory authority may ebb and flow between the federal government and a state on the basis of nothing more than a particular court's narrow construction of the purposes for which the state originally ceded jurisdiction. Here Petitioners were subjected to substantial retroactive liability for complying with federal agency fee law rather than state law, even though NASA, the NLRB and the Virginia Department of Labor and Industry all were of the view (as were the local law enforcement agencies, *see supra* note 4) that exclusive jurisdiction lay with the United States. This liability has been imposed, to the detriment of NASA's claim to exclusive jurisdiction, merely because the Virginia court chose, according to its own lights, to read the words "naval purposes" as confined to activities carried out *by*, rather than *for*, the United States Navy.

Second, as a general matter, construing a state cession statute broadly is more likely to give proper effect to the intent of both the state and federal governments than is a crabbed construction such as the court below adopted. Why, after all, would the Virginia legislature wish—as to land concededly owned by the United States—to cede exclusive jurisdiction if WWF is used by the *Navy* for an *airfield*, but not if it is used by *NASA* to support *rocket launches for the Navy*?

State property law concepts, such as the doctrine of "possibility of reverter" on which the Court below relied, *see supra* at 7, 12-13, simply are not designed to address the question whether regulatory authority over a federal enclave rests with Congress, the state legislature, or both. As *Humble Pipe Line* indicates, a court faced with that question must take into account the value of allowing the federal government leeway to alter its use of an enclave without risking a finding that it has forfeited exclusive jurisdiction merely because a particular court chooses to give a narrow construction to a state cession statute.

5. The Second Circuit recognized as much in *United States v. Johnson*, 994 F.2d 980 (2d Cir. 1993). There, New York ceded land to the United States "for use in connection with the expansion of the Brooklyn Navy Yard," and the United States was to have jurisdiction only for so long as the land was used "for the purposes of the cession." 994 F.2d at 986. The government eventually ceased using the property for "traditional navy yard work" (*i.e.*, shipbuilding), *id.*, and the contention was advanced that jurisdiction had reverted to the state as a result.

The Second Circuit rejected that contention, declaring that "Johnson's interpretation of the grant of jurisdiction is too strict, and does not allow for the evolution of the Navy's needs." *Id.* Emphasizing that "[t]he federal government must be given some leeway in making use of ceded property," *id.*, and citing *Waggonner*, the court concluded that "jurisdiction

ceded to the United States should not revert to the state merely because the function of ceded property evolves over time," *id.*

The *Johnson* court acknowledged that "it is conceivable that some evolution [of the use made of a federal enclave] might exceed the conditions of a grant of land *so severely* as to terminate the cession and cause a reversion of jurisdiction." *Id.* at 986 (emphasis added). By that language, however, the Second Circuit recognized, as this Court had indicated in *Waggoner*, that a court should not read a state cession statute in a manner that destroys the United States' exclusive jurisdiction over a federal enclave unless the federal government's current use of the enclave is *clearly* outside the purposes for which the state ceded jurisdiction. "[A] rigid interpretation of antiquated deeds [or statutes] that failed fully to anticipate the complex development of naval operations," *Johnson*, 994 F.2d at 986, is not a proper basis for curtailing federal jurisdiction over federal property.[10]

The Virginia court failed to heed these principles when it pronounced a "reverter" of jurisdiction from the United States to Virginia. It cannot plausibly be argued that the meaning of the "naval purposes" proviso in the 1940 Virginia statute is so clear as to compel the conclusion reached by the court below.

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[10] Also inconsistent with the decision of the Virginia court is *Osburn v. Morrison Knudsen Corp.*, 962 F.Supp. 1206 (E.D. Mo. 1997). In *Osburn*, Missouri statutes transferred to the United States land "required for military purposes," and ceded exclusive jurisdiction so long as "the United States owns the land and uses the same for th[ose] purposes." *Id.* at 1208. The court held that exclusive jurisdiction was not lost when the Army ceased using the site altogether and transferred control to the Department of Energy to be decontaminated, even though there was no indication as to what use might be made of the site in the future. The court deemed it sufficient that the contaminated condition of the site was due to its *past* military use, and decontamination activities by the Department of Energy were not "*inconsistent with* military use." *Id.* at 1208-09 (emphasis added).

Rather, that court proceeded as if this were an ordinary dispute over private property, in which a court might be free to adopt any reading of the governing documents that is within the bounds of reasonableness, without regard to any particular federal interests. *Waggoner* and *Johnson* teach that that is no way to proceed where what is at stake is the exclusive jurisdiction of the United States over a federal enclave.

Certiorari should be granted to correct the Virginia court's improper encroachment on the exclusive federal jurisdiction that properly applies in this case, and to provide needed guidance to the lower courts respecting the analysis to be followed when it is claimed that the exclusive jurisdiction exercised by the United States over a federal enclave has been divested by virtue of the government's changing use of its property.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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